STATE OF MICHIGAN

COURT OF APPEALS

DIANA DIMITROV,

Plaintiff-Appellant,

v

QUEST DIAGNOSTICS, INC. and NADIA METWALLI,

Defendants-Appellees.

UNPUBLISHED
February 21, 2012

No. 301304
Oakland Circuit Court
LC No. 2009-101679-CZ

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in defendants' favor. We affirm.

Plaintiff is a physician who began employment as a pathologist with Quest Diagnostics, Inc. (Quest) in 2003. In December 2007, plaintiff requested time off for elective shoulder surgery under the Family Medical Leave Act ("FMLA"), 29 USC 2601 *et seq*., but was told by her supervisor, Dr. Metwalli, that she would have to wait until after the holidays to take her medical leave. Plaintiff states that she reported and complained about Metwalli's violation of the FMLA to Quest's human resources and other management, but that Quest also told her she would have to postpone her surgery until after the holidays. Plaintiff underwent surgery in January 2008 and, when she returned to work in March 2008, plaintiff alleges that Metwalli and Quest continued to violate the FMLA and retaliated against plaintiff for voicing her objections to their violations of the FMLA by, among other things, refusing to accommodate her medical restrictions and ultimately terminating her employment. Plaintiff thus filed a complaint against both Quest and Metwalli for retaliation in violation of the FMLA, discrimination in violation of the Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101 *et seq*., and retaliation in violation of the PWDCRA.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) asserting that plaintiff had not and could not establish a retaliation claim under the FMLA because her termination was not only remote in time from her medical leave, but also wholly unrelated to her assertion of any right under the FMLA. Defendants also asserted that there was no question of material fact that plaintiff's claims under the PWDCRA were without merit because plaintiff had no disability, because she could not perform the essential functions of her position, because

defendants nonetheless accommodated plaintiff's alleged disability, and because there was no causal connection between plaintiff's alleged disability and her termination. Defendants also asserted that any claims against Metwalli must fail, as she had no role in the decision to terminate plaintiff's employment. The trial court agreed, granting summary disposition in defendants' favor and dismissing plaintiff's complaint in its entirety. This appeal followed.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law."

On appeal, plaintiff first contends that genuine issues of material fact exist so as to preclude summary disposition in defendants' favor on her claim for retaliation under the FMLA. We disagree.

The purposes of the FMLA are to entitle employees to take reasonable leave for medical reasons and to help working people balance the conflicting demands of work and personal life. 29 USC 2601(b)(1). To that end, the FMLA provides an eligible employee with twelve weeks of unpaid leave during any twelve month period because of a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 USC 2612(a)(1)(D). "The FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the FMLA." *Woodman v Miesel Sysco Food Serv Co*, 254 Mich App 159, 166–167; 657 NW2d 122 (2002).

The FMLA also makes it unlawful for any employer to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the FMLA. 29 USC 2615(a)(2). It is under this theory, known as a retaliation or discrimination violation of the FMLA, which plaintiff seeks recovery. To establish a prima facie claim for retaliation under the FMLA, a plaintiff is required to show that:

> (1) she availed herself of a protected right under the FMLA by notifying [her employer] of her intent to take leave, (2) she suffered an adverse employment action, and (3) that there was a causal connection between the exercise of her rights under the FMLA and the adverse employment action. [*Edgar v JAC Products, Inc*, 443 F3d 501, 508 (CA 6, 2006).]

If the plaintiff is able to establish the three requirements above based solely upon circumstantial evidence, the burden shifts to the employer to show a legitimate, nondiscriminatory rationale for the adverse employment action. *Id*. If the employer succeeds, the burden shifts back to the employee to show that the employer's proffered reason was mere pretext. *Bryson v Regis Corp*, 498 F 3d 561, 570 (CA 6, 2007).

When a retaliation claim is based upon direct evidence, however, the burden simply shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive. *Daugherty v Sajar Plastics, Inc*, 544 F 3d 696, 707-708 (CA 6, 2008). Direct evidence, if believed, requires a conclusion that unlawful discrimination was at least a motivating factor in the employer's conduct. *Kocak v Cmty Health Partners of Ohio, Inc.*, 400 F 3d 466, 470 (CA 6, 2005). Direct evidence must establish not only that the plaintiff's employer was predisposed to discriminate, but also that the employer acted on that predisposition. *Hein v All America Plywood Co.*, 232 F 3d 482, 488 (CA 6, 2000).

In the instant matter, plaintiff asserts that on December 5, 2007, she arranged to have elective arthroscopic surgery on her shoulder on December 21, 2007. Plaintiff states that on December 6, 2007, she telephoned Metwalli to advise her of the surgery, at which time Metwalli told her the lab was too busy and that she could not have time off until after the holidays. On the same date, plaintiff sent an e-mail to the director of human resources at Quest and other members of management complaining how Metwalli had treated her when she had called to discuss "what we can do to make time for my surgery." Plaintiff reported that Metwalli had told plaintiff she could not give her time off for surgery at that time because one of the other pathologists was retiring. Plaintiff claims that though she was eventually permitted to take her medical leave, she was subjected to a steady stream of retaliation by defendants upon her return from medical leave.

Notably, 29 USC 2612(e)(2) provides:

> In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section is foreseeable based on planned medical treatment, the employee--
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> **(A)** shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, parent, or covered service member of the employee, as appropriate; and
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> **(B)** shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

Plaintiff did not initially provide 30 days notice for her elective surgery. Thus, to the extent that plaintiff asserts retaliation for her initial request for medical leave, her request was not a protected right under the FMLA.

Plaintiff also claims that after she returned from her medical leave, she was subject to retaliation, and further claims that she has provided direct evidence of the same. According to plaintiff, around March 2008, Metwalli told her that she should not have gone over Metwalli's head and complained to corporate instead of discussing it with Metwalli and that plaintiff should watch her back from that point on because Metwalli would be after her. However, evidence of discrimination is not considered direct evidence unless improper motivation is explicitly expressed. *Amini v Oberlin Coll*, 440 F 3d 350, 359 (CA 6, 2006). Not only was Metwalli's

statement not an explicit expression of improper motivation (i.e., based upon plaintiff taking leave under the FMLA), plaintiff's allegation, if believed, does not *require* a conclusion that unlawful discrimination was at least a motivating factor in Metwalli's conduct. *Kocak,* 400 F 3d at 470. This is particularly so when one reviews the contents of the complaint made against Metwalli.

In the e-mail to human resources and Quest management, plaintiff wrote that she was "writing this email with a lot of disappointment and pain because of the way I was treated this morning by my supervisor, Dr. Metwalli." Plaintiff detailed her shoulder pain and indicated that her doctor had told her that the only option left was surgery. Plaintiff then related that she called Metwalli:

> to discuss this problem and what we can do to make time for my surgery. Instead of good word of understanding and compassion, I was yelled and screamed and told how big disappointment I am for her. Because of one pathologist is retiring, she cannot give me any time off for surgery. She would not listen when I tried to explain and ask her to help me and may be rearrange the work I do until we hire somebody and then I can take time for surgery. She continue screaming in the phone, that I ruined her weekend and she can't deal with this now and I have to wait until next Monday. Then she hung up on me. I think what she did was extremely unprofessional, unethical and rude.

Nowhere in the e-mail does plaintiff allege a violation of the FMLA. Instead, plaintiff's complaint focuses primarily upon Metwalli's individual treatment of her, her demeanor, and her unprofessionalism in handling the matter of scheduling plaintiff's surgery in general. Plaintiff did not assert a right to take medical leave and Metwalli's unfair or improper refusal to honor that right; instead, plaintiff's complaint was that Metwalli yelled at her, treated her discourteously and was otherwise unprofessional. There being no direct evidence of retaliation, we next review whether, as plaintiff claims, there was circumstantial evidence of retaliation.

Plaintiff offers the following to support her theory that after her return from leave, defendants' possessed a discriminatory animus towards her based upon her complaint about Metwalli's alleged violation of the FMLA and that she was ultimately terminated based upon this animus:

> -plaintiff was subject to intense scrutiny concerning her hours, productivity, and performance;
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> -Metwalli expressed skepticism about plaintiff's shoulder problems and their impact on her ability to complete cases;
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> -Metwalli criticized plaintiff in public meetings, telling plaintiff she was stupid in front of colleagues and announced that she was going to have to rescreen all of plaintiff's cases because of a misdiagnosis;
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> -Metwalli's assistant kept detailed records of the number of cases plaintiff was unable to complete each day;

-Metwalli would not comply with the work restrictions imposed upon plaintiff by her treating physician;

-in October 2008, when plaintiff was unable to complete the assigned number of cases per day, defendant reduced her pay to part-time status, despite the fact that she was still working full time.

Again, considering that the basis for plaintiff's written complaint against Metwalli was her yelling, hanging up on plaintiff and unprofessional manner in general, it is questionable whether the above establishes a causal connection between the exercise of plaintiff's rights under the FMLA and the adverse employment action. See, *Edgar*, 443 F3d at 508. Even assuming, without deciding, that the above allegations present sufficient circumstantial evidence to establish a prima facie case for retaliation, defendants have shown a legitimate, nondiscriminatory rationale for plaintiff's termination and plaintiff has not shown that the employer's reason for her termination was mere pretext. *Bryson*, 498 F 3d at 570.

In her 2005 annual performance review, plaintiff was rated "achieves expectations" with notes that she needed to "work on controlling her reaction when under stress" and "try to separate between personal problems and work issues." In February, 2006, plaintiff was given a verbal warning concerning her interaction with other employees. Specifically, plaintiff was "reminded that physically assaulting a fellow employee is not allowed and any further incident of that nature will not be tolerated." In her 2006 annual performance review, plaintiff again achieved expectations, but needed "to be able to control her temper" and also needed to work on her ability to separate between personal issues and work. In plaintiff's 2007 annual performance review, plaintiff continued to achieve expectations and continued to need to work on controlling her reactions in dealing with other employees.

During two June 2008 meetings (one of which was not attended by Metwalli) plaintiff became emotional and loud and was issued a "final warning" by the head of Quests' human resources department, Cheryl Kaszuba. In November 2008, plaintiff was issued another "final warning" when she failed to report the results of a priority case in a timely manner.

According to Quest employees Dr. Bhattacharjee, Dr. Gupta, Dr. Htwe, Dr. Kintanar, Dr. Lewis, and Dr. Metwalli, at a February 10, 2009 journal meeting, plaintiff became loud, aggressive, and disrespectful to all of those present. According to the above accounts, plaintiff was pointing her finger at Metwalli, yelled at Metwalli and Dr. Lewis and acted in an otherwise unprofessional and inappropriate manner. Her behavior at the meeting was described by the various doctors as "inappropriate," "aggressive," "volatile," "emotional," "verbally attacking," "out of line," and "unprofessional." After the meeting, Kaszuba provided an investigative summary of the meeting to Quest's director of human resources, Cathy Lussiana, along with previous corrective actions concerning plaintiff. Kaszuba recommended that plaintiff be discharged but sought Luissana's opinion. Lussiana responded that she supported termination of plaintiff "based on insubordination and completely inappropriate conduct and behavior in a staff meeting."

The above demonstrates that plaintiff exhibited problems with her temper and demeanor since 2005 and was repeatedly counseled and warned about the same. Plaintiff was ultimately

terminated in March 2009, a year after her return from medical leave due to her actions at a staff meeting. Defendants have thus shown a legitimate, non-discriminatory reason for plaintiff's termination. It therefore falls to plaintiff to show that defendants' reason for termination was a pretext for unlawful discrimination or retaliation. *Bryson*, 498 F 3d at 570.

A plaintiff shows pretext by showing that the proffered reason "(1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Wexler v White's Fine Furniture*, 317 F 3d 564, 576 (CA 6, 2003). A defendant's proffered reason cannot be proved to be a pretext unless it is shown "*both* that the reason was false, *and* that discrimination [or retaliation] was the real reason." *Harris v Metropolitan Government of Nashville and Davidson County, Tenn*, 594 F 3d 476, 486 (CA 6, 2010).

While plaintiff refers this Court to her affidavit and to the affidavit of Dr. Trinh to establish that plaintiff was not yelling during the meetings relied upon by defendants to support her termination, this evidence does not establish that plaintiff's assertion of a right under the FMLA was the reason for her termination, rather than her temper and emotional outbursts, or simply her rocky relationship with Metwalli in general. Plaintiff's 2005 and 2006 reviews indicate that her temper was an issue, even including a warning concerning an assault on another employee, prior to her assertion of any right falling within the FMLA. Plaintiff has thus failed to show that defendants' reason for termination was a pretext for unlawful discrimination or retaliation.

Plaintiff next asserts that her claims of discrimination and retaliation under the PWDCRA should not have been summarily dismissed, as questions of fact exist concerning whether plaintiff has a disability. We disagree.

The PWDCRA prohibits discrimination against individuals because of their disabled status. *Peden v Detroit*, 470 Mich 195, 203; 680 NW2d 857 (2004). The act also directs that persons shall not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.1602(a).

"To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must demonstrate (1) that she is disabled as defined by the PWDCRA, (2) that the disability is unrelated to her ability to perform the duties of a particular job, and (3) that she was discriminated against in one of the ways described in the statute." *Lown v JJ Eaton Place*, 235 Mich App 721, 727; 598 NW2d 633 (1999).

The PWDCRA defines a "disability" as:

> (*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:

> (A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> (*ii*) A history of a determinable physical or mental characteristic described in subparagraph (*i*).
>
> (*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (*i*).
> MCL 37.1103

"Whether an impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect." *Lown*, 235 Mich App at 728. Thus, a disability normally does not include temporary medical conditions, even if those conditions require extended leaves from work. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 479; 606 NW2d 398 (1999). Moreover, it is not enough that an impairment affects a major life activity; the plaintiff must provide evidence leading to a reasonable inference that such activity is substantially or materially limiting. *Lown*, 235 Mich App at 731. And, an impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not substantially limit the major life activity of working. *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996).

In this matter, plaintiff suffered from pain in her left shoulder that increased over a period of time. In 2007 she was diagnosed with a rotator cuff tear and in December 2007, agreed to undergo arthroscopic surgery on her shoulder. Plaintiff underwent surgery on January 4, 2008 and went back to work on March 19, 2008. In June 2008 her shoulder was again in pain. It is unclear exactly when the pain diminished, but it appears to have continued until around October 2008. In support of her contention that she had a disability, plaintiff submitted an affidavit wherein she swore that by April 2007 she experienced excruciating daily pain in her left shoulder. Plaintiff further swore that as a result of the pain, "I found myself unable to care for myself in 2008 and I was unable to do ordinary lifting, unable to wash dishes and pick up trash, and I was unable to care for myself, brushing my hair and brushing my teeth. My condition substantially limited me in these major life activities."

While major life activities do include those things identified by plaintiff such as caring for oneself, *Stevens*, 220 Mich App 212, it appears that plaintiff was unable to care for herself or was limited in life activities only for a short period of time. She did, after all, manage to get herself to her job as a pathologist on a daily basis and perform at least part of her duties, except for a few short months after her surgery. Not every impairment translates into the type of *substantial* impairment that qualifies as a "disability" for purposes of the PWDCRA, particularly when the impairment is temporary. This Court, in *Chiles*, 238 Mich App at 480-482 explained:

Reading the statutory language plainly, an impairment cannot be "substantial" if it is of a merely temporary nature. The types of impairments that are generally temporary are often commonly shared by many in the general public-nearly everyone suffers temporary injuries or maladies at some point in life. Yet the intent of the Legislature here, as well as that of Congress with the federal disability discrimination statutes, was that disability discrimination claims be available only to those with characteristics that are *not* commonplace and are not directly related to ability to do the job. See *Fuqua v Unisys Corp*, 716 F Supp 1201, 1207 (D Minn, 1989). The Fourth Circuit Court of Appeals aptly stated the problem with temporary impairments:

> Applying the protections of the ADA to temporary impairments, such as the one presented here [lower back injury], would work a significant expansion of the Act. The ADA simply was not designed to protect the public from all adverse effects of ill-health and misfortune. Rather the ADA was designed to "assure[ ] that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps." *Forrisi* [*v Bowen*, 794 F.2d 931, 934 (C.A.4, 1986)]. Extending the statutory protections available under the ADA to individuals with broken bones, sprained joints, sore muscles, infectious diseases, or other ailments that temporarily limit an individual's ability to work would trivialize this lofty objective. [*Halperin*, *supra* at 200.]

This commentary applies equally well to the PWDCRA, which this Court has determined has a purpose and language similar to that of the ADA. *Stevens*, *supra* at 216-217, 559 NW2d 61. . . . This inclusion of common ailments and injuries would mean that nearly everyone would qualify as "disabled" at some time during their life. Allowing nearly everyone to take advantage of the PWDCRA would undermine the purpose of the act itself, which was to assure that the "truly disabled" will not face discrimination because of stereotypes. See *Chmielewski*, *supra* at 609, 580 NW2d 817. The larger the class of "protected individuals," the less significant the PWDCRA can be in "equaling the playing field" for those individuals suffering from the most severe and genuinely intractable disabilities. Although we do not adopt any bright-line rule for determining the exact length of time required for "substantial duration" and do not purport to define what types of impairments would qualify as "commonplace," we nonetheless conclude that the term "disability" embodied in the PWDCRA connotes some sense of permanency. Therefore, where an impairment is temporary and relatively easily remedied, when considered in the greater scheme of potential impairments, such as with a temporary back injury, such an ailment is not a substantial limitation on any major life activity.

In this case, the trial court did not err in finding that plaintiff did not suffer from a disability as that term is contemplated by the PWDCRA. While we do not doubt that plaintiff's rotator cuff tear was at times quite painful, her injury did not *substantially* limit 1 or more of her

major life activities that were unrelated to her ability to perform the duties of her particular job. MCL 37.1103. Plaintiff's claims based upon the PWDCRA thus fail.

Plaintiff also asserts that the trial court erred in dismissing plaintiff's claims against Dr. Metwalli in her individual capacity because questions of fact exist as to the role she played in the adverse employment decisions against plaintiff. However, because plaintiff's claims fail altogether, we need not consider this issue on appeal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly